

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GREGORY NICHOLAS STESHENKO,

Plaintiff,

v.

SUZANNE GAYRARD, et al.,

Defendants.

Case No. 13-CV-03400-LHK

13-CV-04948-LHK

**ORDER DENYING PLAINTIFF'S
MOTIONS FOR § 1292(B)
CERTIFICATION FOR
INTERLOCUTORY REVIEW**

Re: Dkt. No. 32, 48

GREGORY NICHOLAS STESHENKO,

Plaintiff,

v.

GERALDINE ALBEE, et al.,

Defendants.

On May 20, 2014, the Court granted Defendants' motions to dismiss in 13-CV-03400 and 13-CV-04948. On May 21, 2014, Plaintiff filed the same motion for certification for interlocutory review of the Court's May 20, 2014 Orders in both actions. Defendants have not filed oppositions to Plaintiff's motions for certification for interlocutory review of the Court's May 20, 2014 Orders.

On June 16, 2014, Defendants in both actions filed a second set of motions to dismiss. The Court granted in part and denied in part Defendants' second round of motions to dismiss in both actions on September 29, 2014. Plaintiff filed Second Amended Complaints in both actions and has opposed Defendants' third round motions to dismiss, which are currently pending. Discovery is ongoing in both actions.

Having considered Plaintiff's filings, the record in these actions, and the relevant law, the Court DENIES Plaintiff's § 1292(b) certification motions.

I. BACKGROUND

In this Court's May 20, 2014 Orders in both *Steshenko v. Gayrard*, No. 13-3400 and *Steshenko v. Albee*, No. 13-4948, the Court dismissed without leave to amend several of Plaintiff's claims alleging violations of the Age Discrimination Act of 1975, 42 U.S.C. § 6102.

In *Gayrard*, No. 13-3400, the Court found that the Age Discrimination Act does not authorize recovery of monetary damages or suits against individual defendants. *Gayrard* Order at 9. As to monetary damages, the Court noted that the explicit judicial remedy of the Age Discrimination Act is limited to injunctive relief and attorney's fees. Relying on the plain text of the statute, as well as other district court cases addressing damages under the Age Discrimination Act, the Court held that Plaintiff could not seek monetary damages from the individual Defendants. *Id.* (citing *Rasmussen v. State DMV*, No. CV 08-1604-FMC (PLA), 2008 U.S. Dist. LEXIS 120895, at *14–15 n.3 (C.D. Cal. Nov. 25, 2008), *Montalvo-Padilla v. Univ. of Puerto Rico*, 498 F. Supp. 2d 464, 468 (D.P.R. 2007), and *Tyrrell v. City of Scranton*, 134 F. Supp. 2d 373, 383 (M.D. Pa. 2001)). The Court further held that the Age Discrimination Act prohibits only "programs or activities" receiving federal financial assistance from discriminating on the basis of age. As the individual Defendants are not "programs or activities" under the statutory definition and do not "receive federal financial assistance," the Court concluded that Plaintiff could not sue Defendants Gayrard and Abramson under the Age Discrimination Act. *Gayrard* Order at 10–11

(quoting 42 U.S.C. § 6107(4)(B)(i)). As such, the Court dismissed Plaintiff's Age Discrimination Act claims against Defendants Gaynard and Abramson with prejudice.

In *Albee*, No. 13-4948, the Court found that the comprehensive remedial scheme in the Age Discrimination Act precluded § 1983 claims. The Court noted that neither the parties nor the Court were able to find any cases addressing whether a plaintiff may bring suit pursuant to § 1983 to enforce the Age Discrimination Act. *See Albee* Order at 13–14. Applying *Ahlmeier v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009), the Court held that the Age Discrimination Act, like the Age Discrimination in Employment Act, contained a comprehensive remedial scheme. More specifically, the Court analyzed the presence of agency oversight and enforcement of the Age Discrimination Act, the administrative remedy available to complainants, and the private cause of action for injunctive relief under § 6104(e)(1)(f). In light of these alternative methods for enforcing the Age Discrimination Act, the Court concluded that these provisions “suggest[] that Congress intended to preclude other methods of enforcement.” *See Albee* Order at 14 (citing *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)). Consequently, the Court dismissed Plaintiff's § 1983 claim under the Age Discrimination Act without leave to amend.

II. LEGAL STANDARD

A district court may, in its discretion, certify an interlocutory order in a civil action for appellate review when the court is of “the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). “[T]he legislative history of 1292(b) indicates that this section was to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). “Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly.” *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 n.6 (9th Cir.

2002).

II. DISCUSSION

Plaintiff requests the Court certify two separate orders to the Ninth Circuit for interlocutory appeal that pose the following two issues: (1) whether individual defendants may be sued for monetary damages under the Age Discrimination Act; and (2) whether the Age Discrimination Act's remedial scheme precludes § 1983 claims. The Court addresses each question separately.

A. *Steshenko v. Gayrard*, No. 13-3400: Age Discrimination Act Claims Against Individual Defendants for Monetary Damages

The Court concludes that Plaintiff has failed to show any "substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Plaintiff has not cited any authority or offered any argument that might support the conclusion that the plain language of the Age Discrimination Act does not preclude suits against individual employees for damages. As the Court noted in its May 20, 2014 Order, every other court to have addressed this issue has concluded that the Age Discrimination Act does not authorize suits against individual defendants for damages. As to damages, those cases and this Court relied on § 6104(e)(1)'s explicit provision for private suits seeking injunctive relief and attorney's fees and the corresponding absence of any statutory language inferring or implying a private cause of action for damages. *See, e.g., Tyrrell*, 134 F. Supp. 2d at 383–84 (citing *Thompson v. Thompson*, 484 U.S. 174, 179 (1988)). As to individual defendants, those cases and this Court relied on § 6107(4)(B)(i)'s definition of "program or activity" and the requirement that the "program or activity" be one that receives federal financial assistance. § 6102. Plaintiff offers no plausible argument as to how the individual defendants could satisfy either requirement, or why reasonable jurists might disagree as to the interpretation of either of these explicit statutory requirements. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir. 2011)

In sum, the Court finds that while the issue of whether the Age Discrimination Act

authorizes suits against individual damages for damages is a controlling question of law, Plaintiff has failed to show there is a “substantial ground for difference of opinion,” as required by § 1292(b). Plaintiff’s mere disagreement with the Court’s conclusion is insufficient to show that there is a “substantial ground for difference of opinion.” *See Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). This may be a “novel” question in that the Ninth Circuit has not specifically addressed this issue, but novelty alone is insufficient unless there is “such a substantial difference of opinion as will support an interlocutory appeal.” *Id.* (quoting 3 Fed. Procedure § 3:212 (2010)). The Court therefore denies Plaintiff’s request to certify the May 20, 2014 Order in *Gayrard* for interlocutory appeal under § 1292(b).

B. *Steshenko v. Albee*, No. 13-4948: Age Discrimination Act’s Remedial Scheme and § 1983 Claims

As an initial matter, the Court acknowledges that the issue of whether the remedial scheme of the Age Discrimination Act of 1975 is sufficiently comprehensive as to preclude § 1983 claims is a question of law. Moreover, the Court’s finding that Congress intended to preclude § 1983 claims under the Age Discrimination Act was dispositive as to those claims.

However, as with the first issue for certification, Plaintiff has not shown that there is substantial ground for difference of opinion. Plaintiff’s “strong disagreement with the Court’s ruling is not sufficient for there to be a substantial ground for difference of opinion” as required by § 1292(b). *Couch*, 611 F.3d at 933. Here, the Court relied on relevant Ninth Circuit and Supreme Court authority in concluding that the Age Discrimination Act’s remedial scheme was sufficiently comprehensive as to preclude claims under § 1983. *See Albee* Order at 13–14. The Court weighed the statute’s remedial scheme, including provisions for agency review and enforcement, administrative remedies, and a limited judicial remedy. Analogizing to the Ninth Circuit’s decision in *Ahlmeier* regarding the comprehensive nature of the remedial scheme in the Age Discrimination in Employment Act, the Court concluded that the Age Discrimination Act’s

1 remedial scheme precluded actions under § 1983. *See* 555 F.3d at 1055–61.

2 Plaintiff contends that there is a split of authority as to whether the Age Discrimination in
3 Employment Act precludes § 1983 claims.¹ It is true that the Seventh Circuit has split with the
4 First, Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits as to whether the Age Discrimination in
5 Employment Act is sufficiently comprehensive as to preclude § 1983 claims. *See Levin v.*
6 *Madigan*, 692 F.3d 607, 615–16 (7th Cir. 2012); *Hildebrand v. Allegheny Cnty*, 757 F.3d 99 (3d
7 Cir. 2014). In *Levin*, the Seventh Circuit concluded that the ADEA’s remedial scheme, while
8 comprehensive, does not provide a remedy for violations of constitutional rights separate and apart
9 from the substantive rights created by the statute itself. *Id.* The controlling authority in this circuit,
10 however, holds that “the ADEA precludes the assertion of age discrimination in employment
11 claims, even those seeking to vindicate constitutional rights, under § 1983.” *Ahlmeier*, 555 F.3d at
12 1057. Plaintiff may take issue with the Ninth Circuit’s decision in *Ahlmeier*, but that does not
13 provide grounds for an interlocutory appeal of this Court’s order applying controlling authority.
14 *See, e.g., Couch*, 611 F.3d at 633 (“[T]raditionally [courts] will find that a substantial ground for
15 difference of opinion exists where the circuits are in dispute on the question and the court of
16 appeals of the circuit has not spoken on the point (internal quotation marks omitted)).

17 Moreover, the Court finds that the immediate appeal of either of the May 20, 2014 Orders
18 would not “materially advance the termination of the litigation.” 28 U.S.C. § 1292(b). Here, the
19 Court has already decided multiple motions to dismiss in each action, with a third set of motions

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22 ¹ The Court notes that Plaintiff references another case in which he claims a court in this district
23 allowed § 1983 claims under the Age Discrimination Act. *See* Motion at 3 (discussing *Steshenko*
24 *v. McKay*). As Plaintiff failed to cite to a specific order, the Court reviewed all of the potentially
25 relevant orders in *McKay* and did not find any order deciding the issues presented by these
26 motions for certification. Plaintiff’s Sixth Amended Complaint in *McKay* does allege claims of
age discrimination under the Age Discrimination Act of 1975. The Court was unable to find,
however, any indication that the *McKay* court was actually presented with the issues of whether
Plaintiff could sue individual defendants for damages under the Age Discrimination Act or raise
§ 1983 claims under the Act.

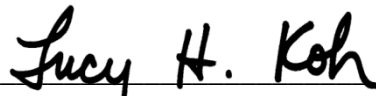
to dismiss pending on the docket. *See* No. 13-3400, ECF No. 66, No. 13-4948, ECF No. 46. Discovery has been ongoing in both actions and the Court has resolved multiple discovery disputes. Plaintiff filed these cases fourteen months ago and the Court is not persuaded that further delaying this litigation for immediate appellate review is warranted.

III. CONCLUSION

For the reasons stated above, the Court DENIES Plaintiff's motions for certification for interlocutory review.

IT IS SO ORDERED.

Dated: December 16, 2014



LUCY H. KOH
United States District Judge

United States District Court
Northern District of California